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ENVIRONMENTAL LAW

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I. INTRODUCTION

During the *Survey* period, the courts focused their attention predominantly upon resolving procedural issues and interpreting statutes. For instance, the Michigan Court of Appeals interpreted the statute of limitations provision contained in the Natural Resources and Environmental Protection Act ("NREPA") to determine when the statute of limitations starts to run in actions for recovery of response activity costs.[1] The court concluded that the triggering event was when the landowner took steps to remedy the damage caused by the environmental hazard.[2] Therefore, the decision may impact the manner in which landowners react to the discovery

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1. Federated Ins. Co. vs. Oakland County Road Commission, 263 Mich. App. 62, 687 N.W.2d 329 (2004).

2. *Id.* at 68, 687 N.W.2d at 333.

of environmental contamination on their properties.

The Michigan Supreme Court, in *National Wildlife Federation v. Cleveland Cliffs Iron Co.*, also clarified the issue of standing.[3] This decision is important because it has the potential to impact environmental law cases filed by nonprofit organizations on behalf of their members. In stressing the importance of the case, the dissenting justice went so far as to say, "Without standing, a court will not hear a person's complaint—the doors to the court are closed."[4] Both the Michigan Supreme Court and court of appeals issued opinions dealing with the interaction between the Michigan Environmental Protection Act ("MEPA") and the Sand Dune Protection And Management Act ("SDPMA").[5]

The most significant development during the *Survey* period was the courts' treatment of the MEPA. MEPA has been hailed as "the most fundamental environmental law in Michigan."[6] Nevertheless, the courts limited the scope of the statute. In *National Wildlife*, the court called into question the validity of the liberal citizen-suit standing provision contained in MEPA.[7] In *Preserve The Dunes I*, the court interpreted MEPA in a manner that may make it more difficult for the plaintiff to establish a prima facie case under the statute.[8]

The purpose of this article is to analyze several key opinions issued by the Michigan courts during the *Survey* period. The specific focus of the article is upon the impact those cases will have on environmental law in Michigan.

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3. 471 Mich. 608, 684 N.W.2d 800 (2004).

4. 471 Mich. at 658, 684 N.W.2d at 829 (Weaver, J., dissenting).

5. Preserve The Dunes, Inc. v. Michigan Dept. of Envtl. Quality (Preserve The Dunes I), 471 Mich. 508, 684 N.W.2d 847 (2004); Preserve The Dunes, Inc. v. Michigan Dept. of Envtl. Quality (Preserve The Dunes II), 264 Mich. App. 257, 690 N.W.2d 487 (2004).

6. James M. Olson & Christopher M. Bzdok, *The MEPA Lives In Northern Michigan And Beyond*, 78 MICH. B.J. 418, 418 (1999).

7. *National Wildlife*, 471 Mich. at 657, 684 N.W.2d at 829.

8. *Preserve The Dunes I*, 471 Mich. 508, 684 N.W.2d 847.

II. MNREPA[9] (AVOIDING SUMMARY DISPOSITION)

A. Tolling The Statute Of Limitations

In *Federated Insurance*, the Michigan Court of Appeals reviewed the properness of the summary disposition motion that the trial court granted.[10] To resolve the case, the court had to decide whether the statute of limitations was tolled in a cost recovery action under the NEPRA.[11] After reviewing the statute, the court held that the cause of action accrued and the statute of limitations began to run when the property owner authorized construction of an on-site treatment system in order to remediate the soil contamination that resulted when petroleum was released onto its property.[12] The court emphasized that the statute of limitations was not tolled until the property owner discovered that the neighboring landowner was responsible for some of the soil contamination.[13]

The incident leading to the litigation occurred in February of 1988, when the contents of an underground storage tank spilled onto property owned by Carl M. Schultz ("Schultz").[14] As a consequence, the soil on Schultz's property was polluted by several toxins, including benzene, toluene, ethyl benzene, and xylenes.[15] A few months after the incident, the Michigan Department of Natural Resources ("MDNR") ordered Schultz to correct any damage to the environment that may have occurred because of the seepage.[16] The road commission owned the land located next to Schultz's property.[17] During May 1991, the road commission reported a petroleum

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9. The Legislature enacted the MNREPA to provide a mechanism for protecting the environment and natural resources of the state. Benjamin John McCracken, *Constitutional Law—Combating Canadian Trash Under the Guise of the Dormant Commerce Clause*, 82 U. DET. MERCY L. REV. 59, 78 n.156 (2004). The statute requires the enforcing agency to take several actions to protect the environment and natural resources of the state. *Id.* The portion of the statute relevant to this case gives the agency the authority "to regulate the discharge of certain substances into the environment." *Id.*

10. *Federated Insurance*, 263 Mich. App. at 66, 687 N.W.2d at 332.

11. *Id.*

12. *Id.* at 68, 687 N.W.2d at 333.

13. *Id.*

14. *Id.* at 63, 687 N.W.2d at 330.

15. *Id.* at 63-64, 687 N.W.2d at 330.

16. *Federated Insurance*, 263 Mich. App. at 64, 687 N.W.2d at 330.

17. *Id.*

leak to the Michigan State Police Fire Marshall.[18]

In the meantime, Schultz responded to the MDNR's mandate in November 1991 by hiring a contractor to build an on-site treatment system to remedy the contamination.[19] Further, Schultz filed a Site Investigation Report and a Site Investigation Work Plan with the MDNR in February of 1992.[20] Afterwards, Schultz began to operate the on-site treatment system.[21] From 1993 to 1994, Federated Insurance, the company that insured Schultz's property, investigated in an attempt to discover if any of the petroleum from the road commission's property had traveled on to Schultz's property.[22] The theory was that some of the contamination on Schultz's property had been caused by the leak on the road commission's land.[23]

Federated's suspicions were confirmed when, in February of 1995, the MDNR determined that some of the spilled petroleum from the railroad's property had migrated on to Schultz's property.[24] A year later, Federated, acting as Schultz's subrogee, notified the road commission of its intent to file a cost recovery action against the commission to be compensated for the damage caused by the migrating pollution.[25] In October of 1997, prior to filing the cost recovery action, Federated tried unsuccessfully to get the road commission to sign a tolling agreement.[26] After the road commission's refusal to cooperate, Federated filed suit on November 1, 2000.[27] Relying on the NREPA, Federated sought past and future remediation costs connected with the environmental damages caused by the petroleum that had originated on the road commission's property.[28]

The road commission made a motion for summary disposition contending that Federated's claim was barred by the statute of limitations set forth in NREPA.[29] The relevant portion of the statute provided:

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18. *Id.* at 64, 687 N.W.2d at 331.
19. *Id.* at 64, 687 N.W.2d at 330.
20. *Id.*
21. *Id.*
22. *Federated Insurance*, 263 Mich. App. at 64, 687 N.W.2d at 331.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Federated Insurance*, 263 Mich. App. at 64, 687 N.W.2d at 331.
29. *Id.* at 65, 687 N.W.2d at 331.

> Except as provided in subsections (2) and (3), the limitation period for filing actions under this part is as follows:
>
> (a) For the recovery of response activity costs and natural resources damages pursuant to section 20126a(1)(a),(b) or (c), within *6 years* of initiation of physical on-site construction activities for the remedial action selected or approved by the department at a facility. . . .[30]

In supporting its motion, the road commission argued that the running of the statute of limitations was triggered in 1991 by Schultz's construction of the on-site treatment system.[31] According to the road commission, in order to comply with NREPA's mandated statute of limitations, Schultz/Federated only had until 1997 to file a cost recovery action.[32] Federated opposed the road commission's summary disposition motion claiming that the statute of limitations did not start to run until February of 1995 when the company obtained proof that the petroleum from the road commission's property had migrated to Schultz's property.[33] Hence, Federated alleged that its claim would not have been barred until 2001.[34] The trial court agreed with the road commission's position and granted its motion for summary disposition.[35] As a result, Federated filed an appeal.[36]

In order to resolve the matter, the Michigan Court of Appeals interpreted the statute.[37] The court started its analysis by reviewing the plain language of the statute.[38] In particular, the court reviewed the definitional provision of the statute and found several sections to be relevant.[39]

One pertinent section defined "remedial action" to include. . . "cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment,

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30. MICH. COMP. LAWS ANN.§ 324.20140(1)(a) (2005) (emphasis added).
31. *Federated Insurance*, 263 Mich. App. at 65, 687 N.W.2d at 331.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 66, 687 N.W.2d at 331.
37. *Federated Insurance*, 263 Mich. App. at 67, 687 N.W.2d at 332.
38. *Id.* at 67, 687 N.W.2d at 332-33.
39. *Id* at 67-68, 687 N.W.2d at 332.

monitoring, maintenance, or the taking of other action that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment."[40] The court interpreted this section of the statute to define remedial action in a broad manner.[41] Thus, it appears that any action that is taken to "prevent, minimize, or mitigate injury to the public health, safety, or welfare, or the environment" is considered to be remediation for purposes of starting the statute of limitations to run.[42] A section of the statute also provided that "'[r]emedial action plan' means a work plan for performing remedial action under this part."[43]

In another germane section, "response activity" is broadly defined to include any action taken "to protect the public health, safety, or welfare, or the environment or the natural resources."[44] In addition, "health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity" are also considered to be response activities.[45] The final section that the court referenced stated, "'[r]esponse activity costs' or 'costs of response activity' means all costs incurred in taking or conducting a response activity, including enforcement costs."[46]

Based upon the applicable definitions contained in the statute, the court held that the on-site construction constituted remedial action.[47] Thus, the statute of limitations started to run the day Schultz started building the treatment system.[48] Federated had six years from that time to bring an action against the road commission. Consequently, since Federated allowed more than that amount of time to pass before filing suit, Federated's action was barred by the statute of limitations.[49]

In reaching its decision, the court responded to several arguments made

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40. *Id.* at 67, 687 N.W.2d at 332 (citing the Michigan Natural Resources Environmental Protection Act (NREPA) § 20101(cc)).

41. *Id.* at 68, 687 N.W.2d at 332-33.

42. *Id.*

43. *Federated Insurance*, 263 Mich. App. at 67, 687 N.W.2d at 332 (citing NREPA § 20101(dd)).

44. *Id.*

45. *Id.* (citing NREPA § 20101 (ee)).

46. *Id.* at 68, 687 N.W.2d at 332 (citing NREPA § 20101(ff)).

47. *Id.* at 68, 687 N.W.2d at 333.

48. *Id.* at 68, 687 N.W.2d at 333.

49. *Federated Insurance*, 263 Mich. App. at 68, 687 N.W.2d at 333.

by Federated.[50]

First, Federated contended that the statute of limitations did not start to run until the MDNR had approved the final remedial action plan in 1993.[51] In rejecting that argument, the court opined that an action to remedy an environmental hazard does not have to be approved by the MDNR to be considered remedial.[52] The court reasoned that, since the Legislature referred to both remedial action and remedial action plan, it intended for the actions to be treated as separate incidents.[53] Therefore, Federated's remedial action activities undertaken in 1991 were separate from the remedial action plan approved by the MDNR in 1993.[54] Hence, the former triggered the statute of limitations, so Federated could not have filed a timely action after 1997.[55]

Federated also argued that the statute of limitations did not start to run until it had completed the on-site construction activities in 1997.[56] The court concluded that this argument was without merit.[57] In determining when the statute of limitations starts to run, the focus is upon when the remedial action activities were started, not when they were completed.[58] Hence, a plaintiff cannot sit on his or her rights until he or she decides to finish remedying the environmental hazard.

Finally, Federated asserted that the court should apply the common law discovery rule to decide when the claim accrued.[59] Application of the

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Federated Insurance*, 263 Mich. App. at 68, 687 N.W.2d at 333.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 69, 687 N.W.2d at 333. "Statutes of limitations generally provide that the limitations period begins to run when a claim or an injury 'accrues' or 'arises.' Traditionally, courts have held that a claim 'accrues' for statute of limitations purposes at the moment when the plaintiff's rights are violated—that is, at the time of the wrongful act or event. Under the discovery rule, however, a plaintiff's claim does not accrue until the plaintiff knows, or in the exercise of reasonable diligence should know, of certain facts underlying the claim." James R. MacAyeal, *The Discovery Rule And The Continuing Violation Doctrine As Exceptions To The Statute Of Limitations For Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 593 (Summer 1996).

discovery rule would have tolled the statute of limitations until Federated discovered or should have discovered that the injury to the property was partially caused by the road commission.[60] The court gave two reasons for rejecting that argument. First, the Court noted that section 20140(1)(a) of the statute did not contain any language indicating that the Michigan Legislature meant to toll the running of the statute of limitations until the plaintiff could discover the existence of additional releases of contaminants from other sources.[61] In fact, the court stated that it was reluctant to imply a discovery rule into one provision of the statute because the Legislature's express inclusion of a discovery rule in another portion of the statute demonstrated that the Legislature knew how to impose a discovery rule when it felt that action was appropriate.[62]

The contested statute did not expressly provide for the application of the discovery rule. Nonetheless, courts often adopt the doctrine in situations where equity dictates that the plaintiff be afforded an adequate opportunity to discover the cause of the complained of injury.[63] Applying the discovery rule does not conflict with the main purpose of having a statute of limitations, to prevent a plaintiff from "sitting" on his or her rights,[64] since the discovery rule is usually permitted in cases where the plaintiff is unaware of his or her rights. The discovery rule would be especially appropriate in environmental cases because the source of pollution is often difficult to pinpoint.[65]

The decision in this case may have an adverse affect on plaintiffs and on the environment. Plaintiffs may be disadvantaged because, once plaintiffs have started remediation, potential defendants may take steps to make their culpability difficult to discover. To avoid the expiration of the statute of limitations, persons may be hesitant to take remedial actions that will benefit the environment. To preserve their claims, persons may spend more time investigating the remediation. This goes against public policy

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60. *Federated Insurance*, 263 Mich. App. at 69, 687 N.W.2d at 333.

61. *Id.*

62. *Id.* NREPA §20140(1)(c) expressly provides that the limitations period for bringing an action for civil fines under the NREPA is three years after the discovery of the violation.

63. "Tolling is an equitable means of suspending application of a statute of limitations where a claim has already accrued and the limitations period has already started to run." MacAyeal, *supra* note 59, at 597.

64. *Id.* at 592.

65. *Id.* at 589.

because the law should encourage persons to mitigate environmental damage by starting remediation actions as soon as possible. Persons may put off remediation as long as the statute permits if they suspect that someone else is partially responsible for the environmental damage.

III. MEPA (AVOIDING SUMMARY DISPOSITION)

Similar to the National Environmental Policy Act ("NEPA"),[66] MEPA is an umbrella statute enacted to provide a mechanism for protecting the Michigan environment. Professor Joseph Sax played a major role in drafting the language that was ultimately adopted into MEPA.[67] One of the primary purposes of MEPA is to provide private citizens with a method of utilizing the courts to protect the natural resources and the environment of the state.[68] The cases analyzed in this section address the procedural hurdles plaintiffs have to overcome to get their day in court: establishing a prima facie case and meeting the standing requirements.

A. Making The Prima Facie Case

In the 2004 *Survey* period the author Kurt M. Brauer analyzed the potential impact of *Preserve The Dunes Inc. v. Michigan Department of Environmental Quality*.[69] Since that time, the case has been remanded and the issues have finally been resolved.[70] Thus, the case is included in this *Survey*.

The following is a recap of the relevant facts of the case. In 1991, TechniSand ("Tech") bought land from the owner of a sand mining operation.[71] As a part of the deal, Tech received that operator's sand

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66. National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370d.

67. Heather Terry, *Still Standing But "Teed Up": The Michigan Environmental Protection Act's Citizen Suit Provision After National Wildlife Federation v. Cleveland Cliffs*, 2005 MICH. ST. L. REV. 1297, 1302-04 (2005).

68. Joseph Castrilli, *Environmental Rights Statutes In The United States And Canada: Comparing The Michigan And Ontario Experiences*, 9 VILL. ENVTL. L.J. 349, 360-61 (1998).

69. 471 Mich. 508, 684 N.W.2d 847.

70. Kurt M. Brauer, *Annual Survey of Michigan Law: June 1, 2002-May 31, 2003*, 50 WAYNE L. REV. 565, 570-72 (2004).

71. *Preserve The Dunes I*, 471 Mich. at 511, 684 N.W.2d at 849.

mining permit.[72] The permit to mine was due to expire in two years.[73] Tech also purchased the Nadeau Site Expansion Area ("NSE"), an area that had been labeled as a "critical dune" area pursuant to the Sand Dune Mining Act ("SDMA").[74] Tech did not have a permit to remove sand from the NSE.[75] Under section 324.63702(1) of the SDMA, no one would be granted a permit to mine in critical dune areas after July 5, 1989.[76] However, after that date, operators seeking to renew or amend previously issued sand mining permits were still eligible to receive permission to mine in those areas.[77]

In addition, an operator who had a valid sand mining permit was eligible to amend that permit to include adjacent property that he or she owned or had the right to mine prior to July 5, 1989.[78] In 1994, relying on the second exception, Tech applied for an amended permit to expand its mining operation onto the NSE.[79] A year later, after concluding that Tech had purchased the sand mining operation after July 5, 1989, the Department of Natural Resources ("DNR") determined that Tech was not entitled to an amended permit based upon the statutory exception.[80] In that same year, as a result of an executive order, the regulation of sand mining became the responsibility of the Department of Environmental Quality ("DEQ").[81]

In May 1996, after the DEQ assumed its role as the regulating agency, Tech made some changes to its application and requested a modified mining

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72. *Id.*

73. *Id.*

74. *Id.*; MICH. COMP. LAWS ANN. § 324.63701-63714.

75. *Preserve The Dunes I*, 471 Mich. at 511, 684 N.W.2d at 849.

76. *Id.* The two exceptions to the prohibition were the following: "(a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application; (b) The operator holds a sand dune mining permit issued pursuant to § 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989, the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit." MICH. COMP. LAWS ANN. § 324.63702(1)(a) and (b).

77. *Preserve The Dunes I*, 471 Mich. at 511, 684 N.W.2d at 849.

78. *Id.* at 512, 684 N.W.2d at 849.

79. *Id.*

80. *Id.*

81. *Id.*

permit.[82] DEQ held a public hearing on the matter and granted Tech's request on November 25, 1996.[83] Consequently, Tech started mining the NSE area.[84] Preserve The Dunes, Inc., a local citizens' group, filed suit against Tech and DEQ.[85] The plaintiffs sought declaratory and injunctive relief based upon two allegations.[86] First, the plaintiffs claimed that DEQ violated the Michigan Environmental Protection Act ("MEPA") by issuing a permit to an ineligible operator.[87] The plaintiffs based their case against the DEQ on the fact that Tech did not meet either of the exceptions stated in the SDMA.[88] The plaintiffs reasoned that, by ignoring the mandates of the SDMA and issuing a sand mining permit to Tech, the DEQ violated MEPA.[89] Second, the plaintiffs contended that Tech's proposed mining project violated the dictates of MEPA.[90]

In response to the plaintiffs' legal action, Tech and DEQ moved for summary disposition alleging that the action was barred by the statute of limitations.[91] The Circuit Court judge rejected their arguments and denied their motion.[92] After that Circuit Court judge retired, the plaintiffs moved for summary disposition.[93] The new judge held that the plaintiffs' SDMA's claim was time-barred.[94] Nevertheless, the judge concluded that the plaintiffs had established a prima facie case[95] with regards to its MEPA

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82. *Id.*

83. *Preserve The Dunes I*, 471 Mich. at 512, 684 N.W.2d at 849.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Preserve The Dunes I*, 471 Mich. at 512, 684 N.W.2d at 850.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 513, 684 N.W.2d at 850.

94. *Id.*

95. *Preserve The Dunes I*, 471 Mich. at 513, 684 N.W.2d at 850. According to the Michigan Supreme Court, "[t]o prevail on a MEPA claim, the plaintiff must make a 'prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources. . . .' MCL 324.1703(1). The defendant may rebut the plaintiff's showing with contrary evidence or raise an affirmative defense that (1) there is no feasible and prudent alternative to the conduct and (2) the 'conduct is consistent with the promotion of the public health, safety, and welfare in light of' the state's concern with protecting

claim independent of any alleged violation of the SDMA. After a trial on the merits, the circuit court ruled that the plaintiffs' prima facie case had been rebutted by the defendants because Tech's proposed conduct would not impair or destroy any natural resources.[96] Thus, the court issued a judgment of "no cause of action."[97] In justifying its decision, the court reasoned that "any adverse impact on the natural resources which will result from the sand mining will not rise to the level of impairment or destruction of natural resources within the meaning of MEPA."[98]

The Michigan appellate court reversed the circuit court and remanded the case so the circuit court could enter an order granting summary disposition in favor of the plaintiffs.[99] In reaching its decision, the appellate court determined that Tech did not qualify for a permit under the criteria set out in the SDMA because the company purchased the NES after July 5, 1989.[100] Thus, the court concluded that, by proving a violation of the SDMA, the plaintiffs had established a prima facie MEPA violation, and the defendants appealed the matter to the Michigan Supreme Court.[101]

The Michigan Supreme Court had to decide if the plaintiffs had established a prima facie MEPA violation. The court analyzed two aspects of the plaintiffs' case. The court first sought to determine if the plaintiffs had proven a per se violation of MEPA relying upon DEQ's actions.[102] Then, the Court evaluated whether the plaintiffs had proven an independent MEPA violation based upon Tech's mining practices.[103] According to the court, a violation of a statute that contains a pollution control standard[104] is

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Michigan's natural resources. *Id.*" *Preserve The Dunes I*, 471 Mich. at 514, 684 N.W.2d at 850.

96. *Id.* at 513, 684 N.W.2d at 850.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Preserve The Dunes I*, 471 Mich. at 513, 684 N.W.2d at 850.

102. *Preserve The Dunes I*, 471 Mich. at 518, n5, 684 N.W. 2d, at 852 n5.

103. The Court concluded that this issue was not ripe for review since "the Court of Appeals never reached PTD's claim that TechniSand's mining operation violates MEPA. . . ." Thus, the case was remanded to the Appellate Court for resolution of the matter. Id. at 521.

104. A pollution control standard is a standard that is designed to prevent pollution or impairment of a natural resource. Olson, *supra* note 6, at 420.

a per se violation of MEPA.[105] Consequently, to make a prima facie case of a MEPA violation, all the plaintiff has to do is to prove that the defendant's conduct violated a pollution control standard set forth in an environmental statute.[106] Hence, in order to evaluate the appellate court's decision, the court had to decide if the SDMA contained a pollution control standard. To make that determination, the court reviewed the plain language of the statute.[107]

The language of the SDMA indicated that the only operator eligible for a permit was one who satisfied the dictates of one of the exceptions to the SMDA ban on mining in critical dune areas.[108] Thus, in determining whether or not to grant a request for a mining permit, the only thing DEQ had to decide was if the operator's situation fit into one of the statutory exceptions.[109] If it did not, the operator was not eligible for a mining permit.[110] In deciding whether or not to award the permit, the DEQ did not have to consider the applicant's proposed conduct.[111] The environmental impact of the applicant's proposed conduct would not become an issue until after the DEQ had determined that the applicant was eligible for a permit based upon the applicant status as either a past owner or operator. Since the operator's conduct was not a determining factor in his or her eligibility for a sand dune mining permit, the court concluded that the statue did not contain a pollution control standard.[112] Thus, DEQ could give an ineligible operator a sand dune mining permit and still not be in violation of MEPA.[113]

Once the court determined that a violation of the SDMA could not be the basis for a per se MEPA violation, it had to decide if the plaintiffs had established a prima facie case for a MEPA violation independent of the SDMA. The question the court had to ask was whether Tech's proposed

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105. *Preserve The Dunes I*, 471 Mich. at 516, 684 N.W.2d at 851-852 (citing MICH. COMP. LAWS ANN. § 324.170(2)(b)).

106. *See e.g*, Nemeth v. Abonmarche Development Inc., 457 Mich. 16, 576 N.W. 2d 641 (1998) (holding "that a violation of the soil erosion and sedimentation control act ("SESCA"), MCL 324.9101 et. seq. may establish a plaintiff's prima facie showing under MEPA because the SESCA contains a pollution control standard.").

107. *Preserve The Dunes I*, 471 Mich. at 515, 684 N.W.2d at 851.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Preserve The Dunes I*, 471 Mich. at 516, 684 N.W.2d at 852.

113. *Id.*

mining project violated MEPA. In order to answer that question, the Court evaluated the connection between the SDMA and MEPA.[114] The SDMA prohibited the DEQ from issuing an amended permit to an applicant if the action the applicant wants to take "is likely to pollute, impair, or destroy the air, water or other natural resources or the public trust in those resources as provided by part 17 [of MEPA]."[115] The court interpreted that language as preventing the DEQ from granting any permits for conduct that violated MEPA.[116]

Since there was no pollution control standard set forth in the SDMA, the court had to apply the standard from MEPA. The test for determining if a defendant's conduct violates MEPA is "whether defendant's conduct will, in fact, pollute, impair, or destroy a natural resource."[117] The court decided that the appellate court acted in error because it presumed that the SDMA contained a pollution control criterion and that Tech's conduct violated that standard.[118] Therefore, the appellate court concluded that the plaintiffs had established a per se violation of MEPA. As a consequence, the appellate court did not decide if Tech's conduct violated MEPA.[119] The Michigan Supreme Court opined that the appellate court could not have completely resolved the matter without fully evaluating the environmental impact of the mining project because MEPA is solely concerned with adverse conduct.[120] In order for an actor to violate MEPA, his actions must conflict with the mandates of the statute.[121] The court ruled that the trial court had correctly attempted to assess the environmental impact of Tech's actions.[122] Thus, the court remanded the case to the appellate court in order for that court to evaluate the Trial Court's decision with regards to Tech's alleged violation of MEPA.[123]

Justice Kelly wrote a forceful dissent attacking the reasoning of the majority opinion. The dissenting justice accused the majority of striking "a

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114. *Id.* at 515, 685 N.W.2d at 851
115. *Id.*
116. *Id.* at 515-16, 684 N.W.2d at 851.
117. *Id.* at 518, 684 N.W.2d at 853.
118. *Preserve The Dunes I*, 471 Mich. at 516-17, 684 N.W.2d at 852.
119. *Id.* at 518, 684 N.W.2d at 852.
120. *Id.*
121. *Id.* at 521, 684 N.W.2d at 854.
122. *Id.* at 518, 684 N.W.2d at 852.
123. *Id.* at 521, 684 N.W.2d at 854.

devastating blow to Michigan's environmental law."[124] Justice Kelly supported her contention by emphasizing that Tech engaged in illegal mining of the sand dune because it was undisputed that the company did not meet the statutory requirements.[125] According to Justice Kelly, the majority did nothing to take the DEQ to task for issuing a permit in violation of the mandates of the SDMA.[126] The appellate court's decision should have been affirmed to remedy the blatant violation of the statute on the part of the DEQ and Tech. Further, the dissent noted that "the majority's decision subverts the purposes of the sand dunes mining act by incorrectly insulating the DEQ's permit decision from scrutiny under the environmental protection act."[127]

On remand, relying upon the majority's reasoning, the appellate court decided that the trial court correctly determined that the SDMA did not contain a pollution control standard, so the plaintiffs could not establish a per se MEPA violation.[128] At trial, the plaintiffs argued that the pollution control standards included in the Sand Dune Protection Management Act ("SDPMA")[129] were applicable to the SDMA. Therefore, the plaintiffs asked the court to conclude that any breach of those standards was a per se MEPA violation. In one section of the SDPMA,[130] the Michigan Legislature emphasized the uniqueness of the sand dunes and the benefits they provided to the state.[131] The plaintiffs wanted the court to read a pollution control standard into that section because the Legislature would want to control pollution in the critical dune areas of the state to protect such a precious resource.[132]

In addition, the plaintiffs' reference to another section of the statute seemed to indicate that the local government, as protector of the sand

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124. *Preserve The Dunes I*, 471 Mich. at 525, 684 N.W.2d at 856 (Kelly, J., dissenting).

125. *Id.*

126. *Id.*

127. *Id.* at 527, 684 N.W.2d at 857.

128. *Preserve The Dunes II*, 264 Mich. App. at 263, 690 N.W.2d at 491.

129. The SDMPA deals with regulating activities in "critical dune areas" and the SDMA deals with regulating sand mining in other areas. Office of Geological Survey, Sand Dune Mining in Michigan Presentation, Jan. 25, 2002 at www.michigan.gov (last visited Aug. 1, 2005).

130. MICH. COMP. LAWS ANN. § 324.35302(a).

131. *Id.*

132. *Preserve The Dunes II*, 264 Mich. App. at 263, 690 N.W.2d at 492.

dunes, had the responsibility to control pollution in the area.[133] The plaintiffs urged the court to interpret the statute to include some type of pollution control standard because the language in one section of the statute reflected the Legislature's desire that the sand dunes be preserved for the benefit of future generations.[134]

The trial court cited several reasons for rejecting the plaintiffs' pollution control arguments. First, the trial court determined that the section dealing with the role of the local government had nothing to do with establishing a pollution control standard.[135] The trial court also noted that the final section referenced by the plaintiffs did not apply to sand dune mining permits because sand mining was expressly exempt from that section of the SDMA.[136] Finally, the trial court acknowledged that the first section of the statute the plaintiffs relied upon should be considered when evaluating the defendants' conduct.[137] Nevertheless, the court failed to read a pollution control standard into the SDMA.[138]

After rejecting the plaintiffs' per se argument, the trial court addressed the issue of Tech's independent violation of MEPA. The court had to determine if Tech's mining practices had violated or would violate MEPA. The court evaluated the case relying upon the criteria set out in the *Portage* case.[139] The *Portage* factors required the court to address the following issues:

> (1) whether the site impacted by Tech's mining operations contained natural resources that were rare, unique, endangered, or has historical significance;
> (2) whether the natural resources in the impacted area could be easily replaced;
> (3) whether Tech's proposed mining operations would significantly affect the other natural resources in the area; and
> (4) whether a crucial number of animals and plants would be

133. *Id.*

134. *Id.*

135. *Id.* at 264, 690 N.W.2d at 492.

136. *Id.*

137. *Id.*

138. *Preserve The Dunes II*, 264 Mich. App. at 264, 690 N.W.2d at 492.

139. Portage v. Kalamazoo Co. Rd., Comm., 136 Mich. App. 276, 355 N.W. 2d 913 (1984).

directly or incidentally impacted by Tech's proposed mining operations.[140]

Both sides presented expert testimony to assist the trial court in evaluating the impact of Tech's mining operations.[141] Tech's experts testified that when the flora in the area was compared with the flora located in most of the 71,000 acres of critical dune areas in the state, it was found to be "typical and unexceptional."[142] Thus, it would not be difficult to replace any flora that might be destroyed by Tech's mining operations. According to defendants' experts, Tech's proposed actions would not substantially impact the water table and inland dune ecosystem because they were restricted by the permit[143] and would be carried out in compliance with the mining and reclamation plan.[144] Tech won the battle of the experts because the trial court decided to based its decision on the testimony given by Tech's expert.[145]

After reviewing all of the evidence, the trial court concluded that Tech's proposed mining activities did not violate MEPA.[146] The trial court reasoned that the proposed removal of sand from the 71 acres[147] would not adversely impact a natural resource that was scarce or had the potential to become scarce.[148] Moreover, the court opined that Tech's mining operations would not have a significant impact on critical sand dune areas in the state because the site it wanted to mine represented a very small portion (1/10 of 1%) of the critical dune area in Michigan.[149] The court also determined that the ban on future sand dune mining was sufficient

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140. *Preserve The Dunes II*, 264 Mich. App. at 262 n.3, 690 N.W.2d at 491 n.3 (citing *Portage*, 136 Mich. App. At 282).

141. *Preserve The Dunes II*, 264 Mich. App. at 266, 690 N.W.2d at 493.

142. *Id.* at 260, 690 N.W.2d at 490.

143. Tech granted the DEQ a permanent conservation easement to maintain the highest dune crest and distancing mining operations from an adjacent wetland and threatened plants. *Id.* at 261 n.2, 690 N.W.2d at 490 n.2.

144. *Id.* at 260-61, 690 N.W.2d at 490.

145. *Id.* at 267, 690 N.W.2d at 493.

146. *Id.* at 262, 690 N.W.2d at 490-91.

147. The site at issue contained 126.5 acres, but only 71.6 acres of the property was designated as "critical dune area." *Preserve The Dunes II*, 264 Mich. App. at 260, 690 N.W.2d at 490.

148. *Id.*

149. *Id.*

protection for the natural resource.[150] Consequently, the court held that the critical dune areas as a whole in the state would not be destroyed or impaired within the meaning of MEPA.[151]

At the appellate level, the plaintiffs alleged several errors on the part of the trial court. Plaintiffs contended that, when deciding the impairment/destruction issue, the trial court improperly considered how Tech's project would impact the total statewide critical dune area.[152] According to the plaintiffs, the trial court should have evaluated the proposed mining project's impact solely on the site involved in the case because each critical dune area is entitled to individual protection from impairment and destruction.[153]

The appellate court determined that the trial court correctly rejected the plaintiffs' argument because the Michigan Legislature intended for courts to evaluate the total environmental impact of sand dune mining operations.[154] That intent was evident by the fact that, in order to obtain a sand dune mining permit, the statute required an operator to prepare an environmental impact statement ("EIS") dealing with "the effect of the proposed activity on the immediate area and on other natural resources, including the groundwater, air, flora, fauna, and wildlife habitats."[155] In addition, the language of the SDPMA used the singular term natural resource when referring to the critical dune areas in the state.[156]

The plaintiffs also claimed that the trial court erred when it applied the *Portage* factors to the case.[157] In light of prior precedent, the plaintiffs contended that the trial court should have used the standard established by the Legislature: "critical dune areas are unique and irreplaceable."[158] The appellate court held that the correct standard was the one stated in the SDMA.[159] The court concluded that those statutory factors were similar to

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150. *Id.* The trial court stated, "this site is the last acreage within critical dune areas in the entire state in which sand mining could be authorized by the DEQ" because critical dune mining was banned after July 5, 1989. *Id.*

151. *Id.* at 265, 690 N.W.2d at 492.

152. *Id.* at 263, 690 N.W.2d at 491.

153. *Preserve The Dunes II*, 264 Mich. App. at 266, 690 N.W.2d at 493..

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 267, 690 N.W.2d at 494.

158. *Id.*

159. *Preserve The Dunes II*, 264 Mich. App. at 267, 690 N.W.2d at 494.

the *Portage* factors; therefore, the trial court did not act erroneously when it relied upon the *Portage* factors to resolve the case.[160]

Although MEPA is the state's version of the National Environmental Policy Act, the court does not appear to give it as comprehensive an application because an actor can violate an environmental statute without violating MEPA. The *Preserve The Dunes* decisions limit the scope of the statute. The impact of the decisions will make it harder for plaintiffs to avoid summary dispositions in MEPA cases. Even if a plaintiff is able to muster the resources to prove that a defendant has violated an environmental statute, that may not be enough for the plaintiff to get a trial on the merits.

If the plaintiff is unable to show that the environmental statute contains a pollution control standard, he or she will have to prove an independent violation of MEPA. It may not be easy for a plaintiff to prove that a statute contains a pollution control standard because there does not appear to be an objective test for determining when a pollution control standard exists. In the *Preserve The Dunes* cases, the courts did not articulate clear criteria for identifying a pollution control standard. This decision has the potential to take MEPA plaintiffs back to the obstacles they faced in the early 1980s. At that time, MEPA plaintiffs had to satisfy a high standard to meet their prima facie case and avoid summary dispositions.[161]

B. Meeting The Standing Requirements

Under the provisions of the MEPA, "any person" can file an action "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."[162] Relying upon the statute, the National Wildlife Federation And Upper Peninsula Wildlife Council ("NWF"), a non-profit organization, filed suit on behalf of their members, in the Ingham Circuit Court.[163] The purpose of the action was to obtain a temporary restraining order and a preliminary injunction to prevent the Cleveland Cliffs Iron Company ("Cleveland Cliffs") and its partner, Empire Iron Mining Partnership ("Empire"), from expanding their mining

160. *Id.* at 268, 690 N.W.2d at 494.

161. Olson, *supra* note 6, at 419.

162. MICH. COMP. LAWS ANN. § 324.1701(1).

163. The case was eventually moved to the Marquette Circuit Court. *National Wildlife*, 471 Mich. at 611, 684 N.W.2d at 804.

operations at the Empire Mine in Michigan's Upper Peninsula.[164]

Prior to filing its lawsuit, the NWF sought a hearing before the Michigan Department of Environmental Quality ("MDEQ") to contest the agency's issuance of a mining permit to Cleveland Cliffs.[165] After the hearing referee dismissed its complaint for lack of standing, the NWF appealed to the Marquette Circuit Court.[166] The circuit court affirmed the referee's decision and the Michigan Court of Appeals declined to hear the NWF's appeal.[167] Thus, as indicated above, the NWF turned to the Ingham Circuit Court for relief.[168] The circuit court concluded that NWF did not have standing to bring the case.[169] After reviewing the plain language of MEPA, the Michigan Court of Appeals reversed the circuit court's decision.[170] The appellate court reasoned that the NWF had standing because the statute allowed "any person" to file an action to protect the environment.[171] The matter came before the Michigan Supreme Court for the limited purpose of resolving the standing issue.[172]

When analyzing if the NWF had standing to bring the case, the Michigan Supreme Court assumed that the organization would have standing under MEPA. Nonetheless, the court focused upon the Legislature's authority to grant standing through the statute. Thus, the issue considered by the court was framed as follows: "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing."[173]

In order to address the issue, the Court assessed the legislative branch's ability to expand the judicial power. Historically, the courts had restricted the exercise of judicial power to situations involving injured parties. By passing a statue permitting "any person" to file an action before the court, the Michigan Legislature attempted to broaden the judicial power to include circumstances involving non-injured parties.[174] The separation of powers

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164. *Id.* at 611-12, 684 N.W.2d at 804-05.
165. *Id.* at 611, 684 N.W.2d at 804.
166. *Id.*
167. *Id.*
168. *Id.*
169. *National Wildlife*, 471 Mich. at 612, 684 N.W.2d at 805.
170. *Id.*
171. *Id.* at 612, 684 N.W.2d at 805.
172. *Id.*
173. *Id.*
174. *Id.* at 616, 684 N.W.2d at 807.

doctrine prohibits one branch of government from delegating its responsibility to another branch. Therefore, the Legislature does not have the authority to expand the judiciary branch's responsibilities beyond those mandated by the constitution.[175]

In reaching its decision, the court spent a substantial portion of its opinion discussing the authority given to the three branches of government by the Michigan Constitution.[176] According to the court, the purpose of the judiciary is to provide a forum for the resolution of disputes involving persons who have suffered a "particularized" injury that is "distinct from that of the general public."[177] Hence, the courts should only become involved in a situation when an individual alleges a specific injury caused by the legislative branch's making of a law or the executive branch's enforcement of a law.[178] It is not the job of the courts to monitor the actions of those governmental branches.[179] The purpose of limiting the exercise of judicial power to cases involving "particularized" injuries is to avoid having the judiciary becoming embroiled in public policy debates.[180] The Michigan Constitution gave the legislative branch the responsibility to regulate public policy through the passage of laws. That branch cannot delegate its duties to the judicial branch.[181]

Consequently, to have standing to bring an action, a person must meet the criteria established by the court in *Lee v. Macomb Co. Bd. of Comm'rs*.[182] In order to comply with the mandates of *Lee*, a person has to

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175. *National Wildlife*, 471 Mich. at 613, 684 N.W.2d at 806-07.

176. *Id.* at 613, 684 N.W.2d at 805. "The Michigan Constitution provides that the Legislature is to exercise the 'legislative power' of the state, Const. 1963, art. 4, § 1, the Governor is to exercise the 'executive power', Const. 1963, art. 5, § 1, and the judiciary is to exercise the 'judicial power,' Const. 1963, art. 6, § 1." *Id.*

177. *Id.*

178. *Id.* at 615, 684 N.W.2d at 806.

179. *Id.*

180. *Id* at 615, 684 N.W.2d at 807. The court states: "Absent a 'particularized' injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate. If a taxpayer, for example, opposed the closing of a tax 'loophole' by the Legislature, the legislation might be challenged in court." *Id.*

181. *National Wildlife*, 471 Mich. at 613, 684 N.W.2d at 805-06. "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id.*

182. 464 Mich. 726, 629 N.W.2d 900 (2001). The court responded to the dissent's

prove at least three things. First, the person must show that he or she has experienced an "injury in fact."[183] To meet that burden, a person must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'"[184] Second, the person must establish that his or her injury was caused by the action being challenged.[185] Finally, the person must prove that a favorable decision by the court is likely to remedy his or her injury.[186] If a person does not meet the *Lee* standing requirements, the person cannot rely upon a statute to have standing to bring a case. Thus, in the case at issue, even though MEPA permits "any person" to bring a cause of action to enforce the statute, the courts will not recognize the claim unless the NWF satisfies the requirements enumerated in *Lee*.[187]

After clarifying the relevant law, the court applied it to the facts of the NWF case. The court noted that non-profit organizations like the NWF can only bring suit on behalf of their members if the members would have standing to sue as individuals.[188] In order to meet the standard set out in *Lee*, the NWF had to assert that the members of the organization had suffered either "an actual injury or an imminent injury."[189]

The NWF submitted affidavits from three members who lived near the mine.[190] The members contended that they participated in recreational activities in the area, that they intended to continue to use the area for those purposes, and that they worried that expanding the mine operation would "irreparably harm their recreational and aesthetic enjoyment of the area."[191]

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criticism of its decision to rely upon the standing requirements set forth in *Lee* instead of the standing provision included in MEPA by stating that the *Lee* rule is not judge-made law because it resulted from an interpretation of the Michigan Constitution. *National Wildlife*, 471 Mich. at 633, 684 N.W.2d at 816. The standards stated in the *Lee* case parallel the federal standing requirements articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992).

183. *National Wildlife*, 471 Mich. at 628, 684 N.W.2d at 814.

184. *Id.*

185. *Id.* at 628-29, 684 N.W.2d at 814.

186. *Id.*

187. *Id.* at 629, 684 N.W.2d at 814.

188. *Id.*

189. *National Wildlife*, 471 Mich. at 629, 684 N.W.2d at 814.

190. *Id.* at 630, 684 N.W.2d at 814.

191. *Id.* NWF members also claimed that they used the area near the mine to bird watch, canoe, bike, hike, ski, fish and farm. *Id.*

One member who owned property next to the mine claimed that, as a result of the mining activities, the local aquifer had dropped too low.[192] Consequently, he had to dig a deeper well because the original one was almost dry.[193] The NWF also submitted an affidavit from an expert to support its case.[194] In his affidavit, the expert explained the potential impact expanding the mining operations would have on groundwater flow, stream flow, water quality, birds, fish and plants.[195] Based upon the evidence presented by NWF, the court held that the organization had satisfied the standing requirements listed in *Lee*.[196] Thus, the court determined that it was not necessary to address the constitutionality of the MEPA standing provision.[197]

Even though the plaintiffs prevailed in the case, Justice Weaver dissented.[198] In the dissenting opinion, Justice Weaver accused the majority of disregarding the mandate of the people.[199] According to Justice Weaver, the Legislature passed MEPA and included a citizen suit provision in it because the people of Michigan constitutionally mandated that the Legislature take steps to protect the environment.[200] Justice Weaver indicated that the majority relied too much upon federal constitutional principles and ignored the differences between the Michigan Constitution and the United States Constitution.[201] The majority's preoccupation with federal law is evidenced by the fact that the standing requirements set forth in the *Lee* case are identical to the ones mandated by the United States

192. *Id.*

193. *Id.* at 630, 684 N.W.2d at 815.

194. *Id.* at 631, 684 N.W.2d at 815.

195. *National Wildlife*, 471 Mich. at 631, 684 N.W.2d at 815.

196. *Id.* at 632, 684 N.W.2d at 815.

197. *Id.* In deciding not to reach the constitutional issue, the court noted, ". . . constitutional issues—whether easy or difficult—are to be avoided where a case can be resolved adequately on non-constitutional grounds." *Id.*

198. *Id.* at 651, 684 N.W.2d at 826 (Weaver, J., dissenting). Justice Weaver stated, "I concur in only the result of the majority opinion. I would hold that plaintiffs having standing under MCL § 324.1701(1) of the Michigan environmental protection act (MEPA) to bring an action to enjoin mining activities that plaintiffs allege will irreparably harm natural resources." *Id.*

199. *Id.*

200. *Id.* at 656, 684 N.W.2d at 829.

201. *National Wildlife*, 471 Mich. at 662-63, 684 N.W.2d at 832.

Supreme Court in *Lujan*.[202]

Further, Justice Weaver asserted that, since the authority of the Legislature to authorize citizen suits through MEPA had been unquestioned for thirty years, the majority's opinion is in conflict with past Michigan case law.[203] Justice Weaver's main concern appears to be the belief that the majority opinion has set the stage to declare the MEPA citizen-suit standing provision to be unconstitutional.[204] Justice Weaver reasoned that, since the majority concluded that the Legislature cannot pass a statute that relaxes the standing requirements enumerated in *Lee*, it is inevitable that the court will determine that the standing requirement in MEPA violates the Michigan Constitution.[205]

Despite the dissent's predictions, the result of *National Wildlife* will probably not have a great impact on Michigan environmental law. Persons who utilize the MEPA citizen suit to file actions to protect the environment will usually be able to prove some type of injury in fact. Thus, they will have standing to bring a MEPA claim.

IV. CONCLUSION

Throughout the *Survey* period, the primary environmental law cases dealt with procedural issues. This article has attempted to put those legal decisions into context.

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202. For a critical discussion of the *Lujan* case, *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," And Article III*, 91 MICH. L. REV. 163 (1992).

203. *National Wildlife*, 471 Mich. at 652, 684 N.W.2d at 826.

204. *Id.* at 671, 684 N.W.2d at 837.

205. *Id.*